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SUPREME COURT, U. S.

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Supreme Court of the United States

October Term, 1948.

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No. 9.

CHARLES KOVACS,

Appellant,

v.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

PETITION FOR REHEARING.

GEORGE PELLETTIERI,
Counsel for Appellant.

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MAY IT PLEASE THE COURT:

Now comes the appellant in the above cause and presents his petition for rehearing, as provided by the rules of this Court. As grounds he shows the Court the following:

GROUNDS.

I.

This Court erred in refusing to reverse the judgment of the State Court because it summarily and erroneously assumed that there was evidence of "loud and raucous noises" whereas it is clear, both in the record and from the findings and opinions of the Courts below, that appellant was not charged with making or broadcasting "loud and raucous noises," that there was no evidence whatsoever that he did make or broadcast "loud and raucous noises" and that there was no finding in the Courts below that he was guilty of making or broadcasting "loud and raucous noises."

II.

Grave error was committed by this Court in refusing to reverse the judgment of the State Court for the reason that it was the conviction of appellant under the challenged ordinance that was attacked on this appeal and *the ordinance as construed and applied and enforced, is unconstitutional and void* in that it abridges appellant's freedoms of speech, press, assembly and to communicate information and opinions to others contrary to the First and Fourteenth Amendments of the United States Constitution.

DISCUSSION.

Appellant was apprehended and brought to trial in the First District Police Court of Trenton, New Jersey, on a complaint made by Patrolman V. Domanski, a police officer of the City of Trenton. This complaint initiated this proceeding. It charged specifically that "Charles Kovacs did violate the 4th Section of an Ordinance of the City of Trenton, No. 430, entitled 'An Ordinance to Prohibit the Making of Unnecessary Noise,' *in that he did, on South Stockton Street, in said City, play, use and operate a device known as a sound truck*" [3].[1] No complaint was made of appellant making or broadcasting "loud and raucous noises."

The only evidence produced against the appellant consisted of the testimony of the complainant, Patrolman Domanski who testified [4]: "That he was on his post in the vicinity of Hanover and N. Stockton Streets, when he heard a sound truck broadcasting music. That he went in the direction of said sound and located said truck on the Stockton Street side of the Municipal Building. That as he approached said truck, the music stopped and he heard a man's voice broadcasting from said sound truck. That he thereupon went over to said truck, informing the occupants, the driver and Charles Kovacs, the defendant, that

[1] All figures appearing in brackets herein denote pages of the printed record.

they were violating the sound ordinance of the City. That he then placed the defendant, Charles Kovacs, and the driver, Paul Nagy, under arrest."

The appellant admitted that he was the person who set the mechanism in said truck playing music and that he did speak into the sound mechanism [4].

Not one iota of evidence was produced that appellant's operation of the sound truck resulted in the emission therefrom of "loud and raucous noises." No testimony at all was given on that question.

The Police Justice, Albert Cooper, Jr., upon the foregoing evidence, convicted appellant "of the offense charged against him in said complaint" [5]. The offense so charged, as previously stated, was solely that appellant "did, • • •, play, use and operate a device known as a sound truck" [3].

It is thus clear from the record of the Court of original jurisdiction, the Police Court of the City of Trenton, that appellant was neither accused nor convicted of operating a sound truck that emits "loud and raucous noises." The charge and conviction was of the operation of "a sound truck." The record is barren of any evidence to prove that "loud and raucous noises" were emitted. It is apparent that that was not the issue tried before the Court. The record discloses that the case was prosecuted and tried by the City and the conviction had upon the theory, advanced by it and adopted by the Police Judge, that under the ordinance the operation of a sound truck *per se* was forbidden and that it was not necessary for the City to establish that the sound truck emitted "loud and raucous noises."

The same theory was adopted and followed by the Supreme Court of New Jersey to which Court appellant then took his conviction for a review. That Court affirmed the conviction of the offense charged against appellant, that is, the use and operation of a sound truck. It stated, referring to the ordinance and the offense charged [15]:

> "In simple, unambiguous language *it prohibits the use upon the public streets of any device known as a sound truck, loud speaker or sound amplifier. This is the only charge made against the defendant in the complaint.* The phraseology of the statute should leave no doubt in the mind of anyone of common intelligence as to what is forbidden." *Kovacs v. Cooper,* 135 N. J. L. 64, 69.

That the New Jersey Supreme Court construed the conviction below and its affirmance of that conviction to constitute an absolute prohibition of the mere use and operation of a sound truck without regard to "loud and raucous noises" is amply clear from a reference to its opinion. The Court said [12]:

> "The freedoms of expression and assembly of the prosecutor may have been prohibited in this respect, but *the ordinance leaves untouched the right of the prosecutor to express his views orally without the aid of an amplifier.*" 135 N. J. L. p. 66.

The Court undoubtedly considered its judgment to be an affirmance of the conviction of appellant on the only offense charged, the mere use of the sound truck, without regard to the volume of sound emitted, and intended that the judgment should constitute an absolute ban on the use of all sound devices in the City of Trenton.

The New Jersey Court of Errors and Appeals, the next Court on the appeal, affirmed the conviction by an equally divided Court. No disagreement with the Supreme Court's opinion was noted by any one of the affirming judges. Those judges too intended their judgment to constitute an absolute ban on the use of sound trucks without regard to "loud and raucous noises." However, Mr. Justice Colie, who voted to reverse, wrote an opinion in which, while agreeing that the prohibition against making "loud and raucous" noises is a reasonable regulation, he called attention to the fact that [24]:

> "The prohibition is against the emitting of 'loud and raucous' noises and applies equally to each of the enumerated categories, i. e. sound truck, loud speaker, sound amplifier, radio or phonograph with loud speaker or sound amplifier, calliope or any other instrument. The only evidence before the trial court was that a patrolman heard a sound truck broadcasting music and heard a man's voice broadcasting from the sound truck. *There is not a scintilla of evidence that the music or voice was loud or raucous, and under the wording of Section 4 such proof is an essential prerequisite to a finding of guilt of a violation.*" *Kovacs v. Cooper*, 135 N. J. L. 584, 585.

The record and the findings and opinions of the Courts below demonstrate that appellant was charged, tried and convicted simply and solely of the use and operation of a sound truck under an interpretation by those Courts that the ordinance in question constituted an absolute prohibition of the use of amplifying mechanism without regard to volume of sound. The New Jersey Supreme Court as well as the Court of Errors and Appeals affirmed on that interpretation.

There was no charge made, no evidence submitted and no conviction had of making or broadcasting "loud and raucous noises." The New Jersey Courts did not conclude that the evidence of search by the patrolman to locate the sound truck on the street was sufficient evidence of loudness and raucousness. They did not even consider that question. The record discloses, without question, that they proceeded upon the theory and interpretation that the ordinance was an absolute ban against the use of sound amplifying devices. They had no intention of applying the ordinance as a regulation of the volume of sound to be emitted from a loud speaker. But rather construed and applied the ordinance upon an assumption that *all* sound amplification constitutes "loud and raucous noises" and is therefore forbidden.

This Court has decided the case as though the ordinance was being attacked only upon its face. This is not so. It is the conviction of the appellant under the ordinance that we have attacked in addition to the fact that we attacked the ordinance upon its face. It is our contention that the ordinance is invalid upon its face, but also unconstitutional and void as construed and applied (Argument K, Brief for Appellant, pp. 11, 27).

It is the duty of the Court to determine whether, even assuming that an ordinance is valid upon its face, it may be unconstitutional as construed and applied to the circumstances of the case.

> "Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another." *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535, 545.

Mr. Justice Reed in the opinion announcing the judgment of the Court, in which the Chief Justice and Mr. Justice Burton joined, assumes that the Courts below found that the amplifier of the truck emitted "loud and raucous noises." The record, as we have pointed out, discloses that the Courts below did not thus find. Nor is there evidence to support that there was an implicit finding.

Since the City is limited in its prohibition to "loud and raucous noises," a conviction, such as here, where there was a mere showing of the use of sound devices would not *per se* constitute an evidence to constitutionally justify such a conviction.

The assumption by the Court that this was a conviction for "loud and raucous noises" is entirely without foundation or justification.

Mr. Justice Reed has misinterpreted our brief in footnote 7 of the opinion. We did not intend to tell the Court that Kovacs was convicted because he played the loudspeaker

with "loud and raucous noises." We submit that he was convicted under Section 4 of the ordinance because he played the loudspeaker and that the use of the loudspeaker does not *per se* constitute a "loud and raucous" noise.

Mr. Justice Reed, the Chief Justice and Mr. Justice Burton have assumed certain facts, that appellant was convicted of making "loud and raucous noises," upon the existence of which facts depends the validity of the appellant's conviction. The existence of such facts should not be presumed and such assumption is erroneous and unlawful. The burden of proof in this case is upon the city to show "loud and raucous noises." The city has wholly failed to make proof of "loud and raucous noises." See, *Busey v. District of Columbia*, 78 U. S. App. D. C. 189, 138 F. 2d 592 (executing mandate at 319 U. S. 579); *United States v. Carolene Products Co.*, 304 U. S. 144, 152; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638-640; *Thomas v. Collins*, 323 U. S. 516, 529-530.

The rule was effectively stated in *Busey v. District of Columbia, supra*, where the Court of Appeals upon reconsideration, held:

> *"We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts, which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded.* • • • No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms."

This Court has established the rule, in a long line of decisions, that the burden is upon the State to prove an

abuse of the rights justifying the abridgment of the freedoms of speech, press and assembly. It is the failure of the State to make such proof here that we contend entitles the appellant to a reversal.

Whether a State statute is valid or invalid under the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid where given another. *Concordia Fire Insurance Co. v. Illinois*, 292 U. S. 535, 545.

When an attack is made upon a statute that it is unconstitutional as construed and applied, it is the duty of the Supreme Court of the United States to make an independent examination of the record and testimony in the case to determine the necessary federal questions from the facts. *Sterling v. Constantin*, 287 U. S. 378; *Fiske v. Kansas*, 274 U. S. 380; *Pennecamp v. Florida*, 328 U. S. 431; *Haley v. Ohio*, 332 U. S. 596.

The Court stated this principle in *Sterling v. Constantin*, as follows (287 U. S., p. 398):

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. . . . Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to this court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of federal right."

And in *Fiske v. Kansas, supra*, it was said (274 U. S. p. 385):

> "The inquiry then is whether the statute is constitutional as applied and enforced in respect of the

situation presented. *Ward & Gow v. Krinsky*, 259 U. S. 503, 510; *Cudahy Co. v. Parramore*, 263 U. S. 418, 422. And see *St. Louis, &c., Railway v. Wayne*, 224 U. S. 354, 359.

"And this Court will review the finding of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Northern Pacific Railway v. North Dakota*, 236 U. S. 585, 593; *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 394; and cases cited."

(And at p. 387):

"The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment."

We repeat that the record is barren of one iota of evidence of the production by appellant of "loud and raucous noises" through his sound truck. The record shows conclusively that the trial court made no such finding of the emission of "loud and raucous noises" from the sound truck. The charge was only of the use and operation of a sound truck [3]. The evidence produced was directed at proving and did in fact prove only that charge, i. e., the use and operation of a sound truck [4]. The trial court found appellant guilty solely of that charge [5]. This Court

erroneously assumed evidence and findings of "loud and raucous noises."

If we are wrong in this contention, then certain it is that the conviction made in the trial court and the decisions of the Supreme Court of New Jersey and the Court of Errors and Appeals of New Jersey were based upon the playing of a loudspeaker as the basis of the conviction and not that there was evidence of "loud and raucous noises." Since the appellant was not convicted of making "loud and raucous noises" in the state courts, the conviction in the Supreme Court of the United States has been changed from the use of a sound truck to the making of "loud and raucous noises", which is the first time that the appellant has been charged or convicted of such a crime.

This Court recently condemned such procedure in a state court as a denial of procedural due process in *Cole v. Arkansas*, 333 U. S. 196, where the opinion of the Court stated (p. 201):

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *In re Oliver*, 333 U. S. 257, 273, decided today, and cases there cited. * * * It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge v. Oregon*, 299 U. S. 353, 362."

(And p. 202):

> "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
>
> "We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process

of law—safeguards essential to liberty in a government dedicated to justice under law."

The same principle which the Court enunciated in *Cole v. Arkansas, supra,* is controlling here. This Court has violated the rights of the appellant to procedural due process in criminal cases by affirming his conviction upon a ground of which he was never aware and upon a ground on which the state courts never relied at all.

It is true that no attempt was made to attack the sufficiency of the complaint. But it is not the complaint that makes the evidence. Whether there is evidence to support a conviction under the constitution depends on what the witness said and not on what is in the complaint. The failure to attack the complaint does not justify the shift of position by this Court from operation of a sound truck to "loud and raucous noises."

The ordinance in question, *as construed and applied,* under the facts and circumstances and the evidence in the record, abridges Kovacs' right of freedom of speech—not on its face, but as construed and applied. The evidence merely discloses the operation of the sound device and nothing more. Patrolman Domanski's testimony is simply that he heard a sound truck broadcasting music and the man's voice [4]. That was all that was said by him. No reference was made by him to "loud and raucous noises", or to the volume of sound emitted. No other witness was produced by the city. Nothing whatsoever was said by anyone in the trial court concerning "loud and raucous noises" nor the volume of sound. No reference was made by the trial judge to "loud and raucous noises." No such finding was made by him [5]. He evidenced no concern with nor interest in the volume of sound emitted by appellant's sound truck.

Since there is no finding that there were "loud and raucous noises" and since the city failed to sustain its burden of proof (*Busey v. District of Columbia,* 78 U. S. App. D. C. 189, 138 F. 2d 592; *United States v. Carolene*

Products Co., 304 U. S. 144, 152; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 638-640; *Thomas v. Collins*, 323 U. S. 516, 529-530) that there were "loud and raucous noises," upon the whole record, the conviction should be set aside because it is an abridgment of the right of free speech, under all the facts and circumstances of the case.

The conclusion reached by the Court, as expressed in the opinion of Mr. Justice Reed that Kovacs was convicted of emitting "loud and raucous noises" from his sound truck, is definitely erroneous.

We submit that the Court has overlooked the fact that a question to be determined is that the constitutional rights of Kovacs were deprived because of the manner in which the ordinance was construed and applied and enforced, under all the facts and circumstances disclosed in the evidence. In failing to consider whether or not the ordinance as construed and applied, has been used to unconstitutionally deprive Kovacs of his liberty and further that Kovacs was neither charged with, tried for nor convicted of broadcasting "loud and raucous noises" over his sound truck and that there was no evidence of the broadcasting of "loud and raucous noises," the Court has inadvertently reached the wrong conclusion.

Without detracting in the least from what we have previously stated herein, we feel that we must express the opinion that it is a dangerous and reactionary principle to rule out sound devices when found to be "loud and raucous." It should be noted that even the Chief Justice and the President of the United States were compelled to use a "loud and raucous" device at the recent inauguration ceremonies so as to be heard by the large audience on the Capitol grounds.

The dangerous effects of this decision on free speech and assembly cannot be minimized by saying that each case depends upon and must be decided according to its own facts. Courts and principles must be consistent to avoid confusion. There are no serious dangers here with which

the Court must concern itself. The slight inconvenience to the public and the police is not sufficient to tilt the scales of freedom and justice against free speech and assembly.

The decision is not at all realistic. While imagining dangers in favor of the police, the Court closes its eyes entirely to the fact that any person using a sound device can be convicted on the opinion of a policeman that it was "loud and raucous," or on a similar opinion of any one person hostile to the views expressed by the user of the sound device.

Little by little, the Court will, by such processes as are employed here, whittle away the pillars of the Bill of Rights and in the name of peace and quiet or of democracy leave this nation in a "police state" where, under the club of "loud and raucous" placed into the hands of an arbitrary police official, all attempts at the exercise of freedom of speech and assembly could be prohibited in public places.

The inconvenience of receiving a leaflet is not sufficient to suppress free speech on the streets. It too is forced on the public, if one finds he is not interested in the message. He may discard it. The inconvenience of listening to a sound device is no greater and is no stronger reason for stopping it. One can avoid listening if one so desires.

It is the function of judicial decisions to settle the law, not to compound confusion. The present status of this matter serves only to leave the law in confusion.

Three of the Justices—a minority—hold this ordinance to be a reasonable regulation of the use of sound amplifying devices. Six of the Justices deny that it is a reasonable regulation, but construe it to be an absolute prohibition of the use of such devices. Yet two of those six Justices—a minority—hold such ban to be permissible and vote with the finders of a "reasonable regulation" to affirm the conviction. Four Justices—still a minority—hold such ban to be unconstitutional. Where is Kovacs or any other person in such a picture? No consideration is given by the majority to the constitutionality of this ordinance as construed and applied to the facts and circumstances in this case and

no determination is made by it on that question. The opinion of the Court convicts appellant of a charge never made against him, on which there was no evidence submitted and of which he was neither tried nor convicted.

Five separate opinions are delivered by the Court. A majority of the Court does not agree on the determination of any one vital question raised in the case. How can Kovacs, or any other person, determine what rights are preserved to him and what rights are restricted or denied him? How can any municipality or other law enforcement official determine what comes within their police power and what is prohibited to them? Must a whole series of cases be brought before the Court before we can hope for some light out of the present confusion?

It is neither fitting nor proper that the Court permit the present situation resulting from the decisions here to continue.

CONCLUSION.

Wherefore appellant prays that the order and judgment heretofore entered herein, affirming the judgments of the Courts below, be set aside and held for naught, and that, on the briefs heretofore submitted and upon consideration of this petition, this motion for rehearing be granted and the Court render an order reversing the judgments of the Courts below or, in the alternative, order the cause to be reargued orally. Appellant prays for such other relief as he may show himself justly entitled to in the premises.

GEORGE PELLETTIERI,
Counsel for Appellant.

Certificate.

I, George Pellettieri, do hereby certify that the foregoing Motion for Rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

GEORGE PELLETTIERI,
Counsel for Appellant.